Supreme Court, U.S.
FILED

No. 09-650

DEC 2 - 2009
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In The

Supreme Court of the United States

KELMER DA SILVA NEVES,

Petitioner,

v.

ERIC HOLDER, U.S. ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

SAHER J. MACARIUS, ESQ.
Counsel of Record
LAW OFFICES OF SAHER J. MACARIUS
21 Walsh Street
Framingham, MA 01701
508-879-4443

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the First Circuit erred in its determination that the First Circuit did not have jurisdiction to review a Motion to Reopen which involved an abuse of discretion by the Board of Immigration Appeals and constitutional claim. *Tandayu v. Mukasey*, 521 F.3d 97, 100 (1st Cir. 2008); *Chen v. Gonzales*, 415 F.3d 151, 153 (1st Cir. 2005).

PARTIES TO PROCEEDING

Kelmer da Silva Neves, Petitioner

Eric Holder, U.S. Attorney General, Respondent

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OPINION AND JUDGMENT BELOW

The Court of Appeals' unpublished order is unofficially reported at *Neves v. Holder*, No. 07-091 (1st Cir. Sept. 8, 2009), and reprinted in the Appendix at 1a-7a.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

INA § 240(c)(7)(B) provides that a Motion to Reopen shall include: "the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material."

In relevant part 8 U.S.C. § 1252(a)(2)(D) states that judicial review is permitted for "constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals." § 1252(a)(2)(B)(ii) does not bar judicial review of discretionary decisions regarding requests to continue or motions to reopen removal proceedings.

The Fifth Amendment to the United States Constitution provides in relevant part that no person shall be deprived of life, liberty, or property, without due process of law."

STATEMENT OF JURISDICTION

By judgment entered June 4, 2009, the United States Court of Appeals for the First Circuit dismissed Petitioner's petition for review for lack of jurisdiction. By judgment entered September 3, 2009, with Mandate issued on January 17, 2009, the United States Court of Appeals for the First Circuit denied Petitioner's petition for rehearing en banc.

Petitioner thereafter timely filed this Petition for Writ of Certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner was an applicant for asylum withholding of removal, and protection based upon Article 3 of the Convention Against Torture. The Immigration Judge denied the Petitioner's application for relief. Thereafter, the Petitioner filed a timely appeal with the Board of Immigration Appeals (BIA). By order dated December 3, 2003, the BIA affirmed the Immigration Judge's order. On June 30, 2006, Petitioner filed a second motion to reopen based upon ineffective assistance of counsel. On December 14, 2006, the BIA denied this Motion. Petitioner thereafter timely filed a Petition for Review with the United States Court of Appeals for the First Circuit. This petition for review was based on a final agency determination. 8 U.S.C. § 3.1(a)(7). The First Circuit had jurisdiction based upon 8 U.S.C. § 1252(a)(2)(B)(ii).

By judgment entered June 4, 2009, the First Circuit dismissed Petitioner's petition for review for lack of jurisdiction. By judgment entered September 3, 2009, with Mandate issued on September 17, 2009, the First Circuit denied Petitioner's petition for rehearing en banc. Petitioner now timely petitions this Court for review.

STATEMENT OF FACTS

Petitioner is a native and citizen of Brazil and entered the United States as a B-2 visitor in 1999. Petitioner retained Joarez Reis, who he believed to be an attorney, to represent him in his applications for asylum, withholding of removal, and protection under the Convention against Torture. On November 1, 2000, the Immigration Judge denied these applications for relief. Thereafter, on November 21, 2000, Mr. Reis filed a Notice of Appeal to the BIA on behalf of the Petitioner. However, since Mr. Reis was not a licensed attorney, he put a post office box [rented by Mr. Reis] as the forwarding address and signed the Petitioner's name. A.R. 20.

On September 25, 2001, the Board dismissed the appeal, deeming it abandoned because there was not an address to which the mail could be effectively sent.

While Petitioner's appeal was pending, Mr. Reis fled Massachusetts to avoid criminal prosecution. By the time of the Board's decision, Mr. Reis had been

arrested by the FBI and was later convicted and imprisoned for 54 counts of mail fraud and lying to the government. A.R. 22-29.

In the meantime, in December 2000, the Petitioner retained another attorney, John Dvorak, to file a Labor Certificate under section 245(i). The Petitioner informed Attorney Dvorak of his appeal pending with the BIA. However, he did not file a Notice of Appearance until April 2002. A.R. 31. The Board forwarded a copy of the September 25, 2001 decision. Attorney Dvorak stated that he would file a Motion to Reopen the proceedings. In May 2003, Petitioner went to Attorney Dvorak's office to inquire about the Motion and discovered that nothing had been filed. Thereafter Petitioner discharged Attorney Dvorak. A.R. 33.

Then, Petitioner retained Gary Yerman. In August 2003, Attorney Yerman filed a Motion to Reopen the Petitioner's proceedings. Mr. Yerman's motion was based on the requirements of Matter of Lozada; however, he failed to attach the appropriate documentation in support of the case. Furthermore, Attorney Yerman failed to request the appropriate relief since the Petitioner was eligible for Adjustment of Status under the Section 245(i) and the LIFE Act. A.R. 35. Petitioner frequently contacted Mr. Yerman's office to inquire about the status of the Motion. In June 2006, the Petitioner discovered that the Motion had been denied on December 3, 2003. Petitioner discharged

Attorney Yerman and retained Joseph Rose to file a subsequent Motion to Reopen.

ARGUMENT OF THE FIRST ISSUE

This Court has jurisdiction to review the denial of a motion to reopen for an abuse of discretion. Here, the findings in this case that the court lacks jurisdiction are contrary to precedent cases in the First and sister circuits.

The BIA's denial of a motion to reopen may be reviewed for an abuse of discretion. *Tandayu v. Mukasey*, 521 F.3d 97, 100 (1st Cir. 2008); *Chen v. Gonzales*, 415 F.3d 151, 153 (1st Cir. 2005). The BIA's decision will be upheld "unless the complaining party can show that the BIA committed an error of law or exercised its judgment in an arbitrary, capricious, or irrational way." *Tandayu*, 521 F.3d at 100 (*quoting Raza v. Gonzales*, 484 F.3d 125, 127 (1st Cir. 2007)); *see also Chen*, 415 F.3d at 153 ("An abuse of discretion exists where the BIA misinterprets the law, or acts either arbitrarily or capriciously.") (*quoting Toban v. Ashcroft*, 385 F.3d 40, 45 (1st Cir. 2004)).

The circuit court may review the denial of motions to reopen immigration proceedings for abuse of discretion. *Ali v. Gonzales*, 448 F.3d 515 (2d Cir. 2006); *INS v. Doherty*, 502 U.S. 314, 322-23 (1992). The First Circuit has determined that "Motions to reopen removal proceedings are disfavored because . . . such motions are at odds with 'the compelling

public interests in finality and the expeditious processing of proceedings.'" *Beltre-Veloz v. Mukasey*, 55 F.3d 7, 9 (1st Cir. 2008) (*quoting Guerrero-Santana v. Gonzales*, 499 F.3d 90, 92 (1st Cir. 2007)). However, the First Circuit has determined that it has jurisdiction to review the BIA's decision not to reopen a case for abuse of discretion. *Punzalan v. Holder*, 575 F.3d 107 (1st Cir. 2009). In *Punzalan*, the First Circuit determined that they "do have jurisdiction" to review the case. *Id.*; *Arias-Valencia v. Mukasey*, 529 F.3d 428, 430 (1st Cir. 2008). "Our review is highly deferential, focusing on the rationality of the decision to deny . . . reopening, not on the merits per se, of the underlying claim." *Id.*; *Abdullah v. Gonzales*, 461 F.3d 92, 99 (1st Cir. 2006). The circuit court will set aside the BIA's decision "only where it rests on an error of law or reflects arbitrary or capricious decision making." *Oliveira v. Holder*, 568 F.3d 275, 277 (1st Cir. 2009). Here, the findings in this case that the court lacks jurisdiction are contrary to precedent cases in the First and sister circuits.

A motion to reopen ordinarily must be filed within ninety days of the entry of the final decision in the underlying proceeding. *See* 8 C.F.R. § 1003.2(c)(2). This provision may be subject to equitable tolling provided that the petitioner has "pass[ed] with reasonable diligence through the period [he] seeks to have tolled." *Iavorski v. INS*, 232 F.3d 124, 134 (2d Cir. 2000) (*quoting Johnson v. Nyack Hosp.*, 86 F.3d 8, 12 (2d Cir. 1996)). While ineffective assistance of counsel may, under certain circumstances, provide a

sufficient basis for equitable tolling, "an alien must demonstrate not only that the alien's constitutional right to due process has been violated by the conduct of counsel, but that the alien has exercised due diligence in pursuing the case during the period the alien seeks to toll." *Id.* at 135; *see also Cekic v. INS*, 435 F.3d 167, 170 (2d Cir. 2006) (noting that "no matter how egregious[ ] ineffective counsel's assistance may have been, an alien will not be entitled to equitable tolling unless he can affirmatively demonstrate that he exercised reasonable due diligence during the time period sought to be tolled").

In this case, Petitioner did establish that he acted with "due diligence" in accordance with the standard set forth in precedent case law. *Jobe v. INS*, 212 F.3d 674 (1st Cir. 2001) *rev'd en banc* 238 F.3d 96 (1st Cir. 2001); *Boakia v. Gonzales*, 447 F.3d 1, 3 (1st Cir. 2006). The First Circuit failed to make a determination regarding the abuse of discretion committed by the BIA in its finding that the Petitioner did not act diligently. The Petitioner argues that the BIA erred in its finding:

> The First Circuit has also stressed due diligence in filing the Motion. *Jobe v. INS*, 212 F.3d 674 (1st Cir. 2001). The BIA denied the Petitioner's motion on the basis that the Petitioner did not seek due diligence in reopening his case. AR 2. However, the Petitioner has shown due diligence in reopening his case. The Petitioner was not aware of the denial of relief until years after the deadline had lapsed. The Petitioner discovered that

> his case was denied in June 2006. Upon this discovery, Petitioner promptly filed a Motion to Reopen within one month. In Yerman's response to Petitioner's complaint, he fails to defend or otherwise contradict the Petitioner's claims that he was never notified of the results of his case. As Attorney Yerman is the attorney of record, he is in effect responsible for the actions of his employees. Here, Petitioner's actions are sufficient to show that he acted diligently in retaining new counsel and reopening his case. *See* Petitioner's Brief at 12-13.

In a recent case, it was recognized that sworn affidavits from counsel must be considered evidence by the BIA. *Kulhawik v. Holder*, ___ F.3d ___, No. 08-4582 (2d Cir. July 6, 2009). The BIA erred in this case by stating that the Respondent failed to provide specific evidence to corroborate his assertion of due diligence. The Board failed to give proper weight to the sworn affidavit from Respondent's prior counsel which detailed the actions taken by the Respondent and by his Law Office.

Here, an issue of law is raised in that the Board's findings were arbitrary and capricious in that the Petitioner did not act diligently. Here, this Court has jurisdiction to review this case similar to other cases such as *Dawoud v. Holder*, 561 F.3d 31 (1st Cir. 2009).

Where the Board has exercised its authority in an arbitrary, capricious, or irrational manner, this Court must remand to the Board. *Kichichian v.*

Mukasey, 535 F.3d 15, 22 (1st Cir. 2008). The decision by the Board is a reversible error of law. In its analysis of due diligence, this Court must focus on the length of time that an alien failed to inquire into their status and the length of time that an alien failed to act after the alien had knowledge of the attorney's error. *See Beltre-Veloz*, 55 F.3d at 11 (1st Cir. 2008) (lack of due diligence where alien did not inquire into status for eight years despite knowledge of proceedings); *Do Nascimento v. Mukasey*, 549 F.3d 12, 18 (1st Cir. 2008); *see Boakia v. Gonzales*, 447 F.3d 1, 4 (1st Cir. 2006) (lack of due diligence where Petitioner failed to file new motion for six months after hiring new counsel). In this instance, the Board erred in its application of the facts to the law. In *Chedid*, the First Circuit determined that "even assuming equitable tolling were available, we could only reach the merits of ineffective assistance of counsel claim if the Board abused its discretion in finding that he had not exercised the 'due diligence' required by our case law." *Chedid v. Holder*, 573 F.3d 33 (1st Cir. 2009). Here again, the First Circuit determined that it had jurisdiction to review an abuse of discretion by the BIA concerning a "due diligence" claim.

ARGUMENT OF THE SECOND ISSUE

This Court does have jurisdiction under REAL ID to review constitutional questions, and the Petitioner has raised a constitutional question here. 8 U.S.C. § 1252(a)(2)(D) (2005); REAL ID Act of 2005, Pub. L.

No. 109-13, 119 Stat. 231, 302 (codified in scattered sections of 8 U.S.C. and 49 U.S.C.). Although adjustment under section 245(i) may be categorized as a discretionary benefit, this Court has jurisdiction to review "non-discretionary legal decisions that pertain to statutory eligibility for discretionary relief." *Gonzalez-Oropeza v. U.S. Att'y Gen.*, 321 F.3d 1331, 1332 (11th Cir. 2003); 8 U.S.C. § 1255(i) (2000). In this instance, where the Petitioner has alleged a due process violation, this Court has jurisdiction to review that claim. This Court has jurisdiction to review the argument that Petitioner's counsel was so ineffective that Petitioner was unable to present his adjustment of status application based on his eligibility under section 245(i). *See Do Nascimento*, 549 F.3d at 17.

A number of other courts have carried out a detailed statutory construction analysis of section 1252, and all agree that Congress intended the limiting phrase "judgment regarding the granting of relief" in section 1252(a)(2)(B)(i) to refer only to discretionary *determinations*. 8 U.S.C. § 1252(a)(2)(B) (2005); *see Mendez-Moranchel v. Ashcroft,* 338 F.3d 176 (3d Cir. 2003); *Mireles-Valdez v. Ashcroft*, 349 F.3d 213 (5th Cir. 2003); *Iddir v. INS*, 301 F.3d 492, 496 (7th Cir. 2002) (jurisdiction where the application was never adjudicated and the agency thus never exercised its discretion); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1142 (9th Cir. 2002); *Gonzalez-Oropeza*, 321 F.3d at 1332 (indicating § 1252(a)(2)(B) is limited to discretionary decisions). The courts carefully considered Congress' use of the term "judgment" in more than a dozen places in the INA and found that it was

used in only two ways: 1) to refer to a formal decision given by a court; or 2) to refer to the exercise of discretion or to a discretionary determination. "From this, the court[s] concluded it was unlikely Congress would intend a third meaning for 'judgment,' applying it to *any decision* involving the exercise of discretion." *Mendez-Moranchel,* 338 F.2d at 178, *discussing Montero-Martinez v. Ashcroft*, 277 F.3d at 1140 (emphasis in original). "Analytically, the decision whether an alien is eligible to be considered for a particular discretionary form of relief is a statutory question separate from the discretionary component of the administrative decision whether to grant relief." *Goncalves v. Reno*, 144 F.3d 110, 125 (1st Cir. 1998).

Furthermore, First Circuit case law specifically holds that the speculative character of discretionary waivers of deportation is not an absolute bar to a due process claim alleging incompetence of counsel, but rather such character bears on the likelihood that counsel's conduct affected the outcome. *Hernandez v. Reno,* 238 F.3d 50, 56 (1st Cir. 2001). In this case, the acts by Petitioner's counsel violated his due process right to present his adjustment of status application and clearly affected the outcome of his case.

CONCLUSION

Based on the foregoing, Petitioner respectfully asks that this Petition for a Writ of Certiorari be granted and that he be given the relief requested. The First Circuit panel has clearly deviated from the precedent established. It is within the interests of justice that the panel grant certiorari of this case.

Sincerely,

SAHER JOSEPH MACARIUS, ESQ.
Counsel for Petitioner
21 Walsh Street
Framingham, MA 01701
508-879-4443

United States Court of Appeals
For the First Circuit

No. 07-1091

KELMER DA SILVA NEVES,

Petitioner,

v.

ERIC H. HOLDER, JR.,* ATTORNEY GENERAL,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

Before
Lynch, *Chief Judge*,
Torruella and Ebel,** *Circuit Judges*.

Saher Joseph Macarius with whom Audrey Botros and Law Offices of Saher Joseph Macarius were on brief for petitioner.

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* Pursuant to Fed. R. App. P. 43(c)(2), Attorney General Eric H. Holder, Jr. has been substituted for former Attorney General Michael B. Mukasey as the respondent.

** Of the Tenth Circuit, sitting by designation.

Stacey I. Young, Office of Immigration Litigation, Civil Division, U.S. Department of Justice, with whom Michael F. Hertz, Acting Assistant Attorney General, and J. Max Weintraub, Senior Litigation Counsel, were on brief for respondent.

June 4, 2009

PER CURIAM. Petitioner Kelmer Da Silva Neves, a native and citizen of Brazil, petitions for review of the denial by the Board of Immigration Appeals of his second motion to reopen, which the Board denied on December 14, 2006. Neves's first motion to reopen was denied on December 3, 2003 due to his failure to exercise due diligence in seeking reopening of a September 25, 2001 decision by the Board, which dismissed his asylum appeal.

The second motion to reopen, the denial of which is now before us, was filed on June 30, 2006 and was denied by the Board as untimely and numerically barred. *See* 8 U.S.C. § 1229a(c)(7)(A); 8 C.F.R. § 1003.2(c)(2). Neves's second motion sought reopening of the Board's December 3, 2003 decision.

The Board rejected Neves's argument that the time and number limits should be equitably tolled so he could seek adjustment of status under § 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i). *See* 8 C.F.R. § 1003.2(c)(2). The Board found that while Neves had substantially complied with the

requirements to show ineffective assistance of counsel under *In re Lozada*, 19 I. & N. Dec. 637 (BIA 1988), he nonetheless had failed to show that he exercised due diligence in seeking reopening.

We need not and do not decide whether the statutory provision limiting motions to reopen is subject to equitable tolling. Even if it were, the equitable tolling doctrine is unavailable to a party who has failed to exercise due diligence, as the BIA found here. *Boakai v. Gonzales*, 447 F.3d 1, 3 (1st Cir. 2006) ("[I]f the equitable tolling doctrine is available at all, the petitioner must first show that he has acted with due diligence.").

No constitutional claim or issue of law is raised by petitioner as to the Board's finding of lack of diligence, contrary to the assertions in his reply brief.[1] And where the Board has made a factual determination of lack of due diligence not raising an issue of law or a constitutional claim, under the provisions of the REAL ID Act, 8 U.S.C. § 1252(a)(2)(B)(i), (D), we have held we lack jurisdiction to review the Board's decision. *Ouk v. Mukasey*, 551

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[1] Because the BIA denial was based on a lack of diligence, the claim of ineffective assistance of counsel is not before us. Indeed, the BIA found lack of diligence even assuming counsel was ineffective. Further, even if we had jurisdiction, the ineffective assistance claim is waived. *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

F.3d 82, 83-84 (1st Cir. 2008); *Fustaguio Do Nascimento v. Mukasey*, 549 F.3d 12, 18-19 (1st Cir. 2008); *see also Boakai*, 447 F.3d at 4.

The Board further declined to exercise its authority to sua sponte reopen. We have no jurisdiction over this latter decision. *Peralta v. Holder*, No. 08-2073, ___ F.3d ___, 2009 WL 1475557, at *6-8 (1st Cir. May 28, 2009); *Luis v. INS*, 196 F.3d 36, 40 (1st Cir. 1999).

The petition is *dismissed* for lack of jurisdiction.

United States Court of Appeals
For the First Circuit

No. 07-1091

KELMER DA SILVA NEVES,

Petitioner,

v.

ERIC H. HOLDER, JR.,[1]
ATTORNEY GENERAL, Respondent.

JUDGMENT

Entered: June 4, 2009

This cause came on to be submitted on a petition for review of an order of the Board of Immigration Appeals.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The petition for review is dismissed for lack of jurisdiction.

By the Court:

/s/ Richard Cushing Donovan, Clerk

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[1] Pursuant to Fed. R. App. P. 43(c)(2), Attorney General Eric H. Holder, Jr. has been substituted for former Attorney General Michael B. Mukasey as the respondent.

cc: Ms. Botros, Mr. Macarius, Ms. Bain, Mr. Furlong, Mr. Amaya, Ms. Bing & Ms. Young.

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board of
Immigration Appeals

File: A77 549 308 – Boston Date: DEC 14 2006

In re KELMER DA SILVA NEVES

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Joseph Rose, Esquire

ORDER:

PER CURIAM. This case was last before the Board on December 3, 2003, when we denied the respondent's untimely motion to reopen. The respondent's prior motion to reopen was denied because, *inter alia*, the respondent failed to exercise due diligence in seeking reopening of our September 25, 2001 decision dismissing his appeal (BIA Dec. dated 12/3/03). *See Jobe v. INS*, 238 F.3d 96, 98-99 (1st Cir. 2001). On June 30, 2006, the respondent filed his second motion to reopen. The motion is untimely and number-barred. *See* 8 C.F.R. § 1003.2(c)(2). The respondent contends that the time and number limits for filing his motion should be equitably tolled because he received ineffective assistance of counsel. The respondent has substantially complied with the requirements of *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003) and *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The respondent requests that his proceeding be reopened

and the record remanded so that he may seek adjustment of status under section 245(i) of the immigration and nationality Act, 8 U.S.C. § 1255(i).

The respondent failed to demonstrate, however, that he exercised due diligence in seeking reopening. *See Jobe v. INS*, *supra*. *See also Chen v. Gonzales*, 415 F.3d 151, 154 (1st Cir. 2005). The respondent claims that 3 years after his former attorney, Gary Yerman, filed a motion to reopen he went to Mr. Yerman's office in June 2006 and learned that the motion had been denied during December 2003. The respondent alleges that he had frequently contacted Mr. Yerman's office to inquire about the status of the motion and was advised to be patient. The respondent also included a letter from Mr. Yerman, which states that the employee who allegedly failed to notify him of the denial was fired. The respondent and Mr. Yerman fail, however, to identify the particular employee responsible for notifying the respondent. Further, the respondent has not provided the dates that he contacted his former attorney's office from 2003 to 2006, or who he spoke to when he contacted the office. In short, the respondent has not provided sufficient specific, relevant information to corroborate his generalized assertion of due diligence.

Further, we decline to exercise our *sua sponte* authority. *See* 8 C.F.R. § 1003.2(a); *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999) (fundamental change in law may warrant *sua sponte* reopening notwithstanding otherwise applicable time and number limitations on motions); *Matter of J-J-*, 21 I&N Dec.

976 (BIA 1997) (Board retains limited discretionary power under the regulations to reopen or reconsider only in exceptional circumstances). Accordingly, the motion is **denied**.

/s/ Frederick D. Hess
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
U.S. IMMIGRATION COURT
Boston, Massachusetts

File No.: A 77 549 308 November 1, 2000

In the Matter of

KELMER DA SILVA NEVES,)
)
Respondent)

IN REMOVAL PROCEEDINGS

CHARGE: Section 237(a)(1)(B) of the Immigration and Nationality Act – remained longer than permitted.

APPLICATIONS: Political asylum; withholding of removal; voluntary departure.

ON BEHALF OF RESPONDENT:

David R. Harsch, Esquire
3179 Main Street
P.O. Box 1000
Barnstable, MA 02630

ON BEHALF OF SERVICE:

Richard D. Neville, Esquire
Assistant District Counsel
JFK Federal Building,
Room 425, Government Center
Boston, MA 02203

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent in this case is a 24-year-old, single, native and citizen of Brazil. Removal proceedings were instituted against him when the

Immigration and Naturalization Service issued a Notice to Appear on December 2nd, 1999, charging him with being removable from the United States on the basis of the charge set forth above. (Exhibit 1).

The respondent, through counsel, admitted the factual allegations in the Notice to Appear, conceded removability as charged, declined to designate a country for removal purposes if necessary, and sought the opportunity to apply for political asylum, withholding of removal, and voluntary departure in the alternative. (Exhibit 2).

The respondent has submitted an application for political asylum, which will also be considered as a request for withholding of removal. In order to qualify for asylum relief, the respondent must show that he meets the definition of a "refugee" in that he is outside his country of nationality and is unable or unwilling to return or avail himself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

As to the withholding of removal, the burden of proof is on the applicant to establish that his life or freedom would be threatened in the proposed country of deportation. For instance, that is to say that it is more likely than not that he would be persecuted on account of one of the five statutory grounds.

With respect to his application for political asylum, the respondent says in essence that he worked

in Brazil for the state-owned electric company between May of 1997 and February of 1999. The name of the company was the Company of Electricity of Rio de Janeiro. According to the respondent, it was his responsibility to inspect the power meters of commercial establishments in order to determine whether or not electricity was being stolen. He says that after the verification of stolen electricity he would immediately contact the police experts, who would pursue the investigation and make arrests as necessary.

The respondent says that during the course of his employment he had received several threats as a result of his investigations. He says that in or about February of 1999, he was directed to inspect a restaurant and nightclub owned by one Jose Pedro. According to the respondent, he appeared at the restaurant and notified Pedro that he would face criminal charges for the stolen electricity. He says that he was beaten by the owner, as well as the security personnel, at the nightclub/restaurant and told by the owner that he would be killed if he were to report these activities to the police.

The respondent says that thereafter he did indeed report to the police headquarters in the community of Cabo-Frio, as a result of which the police verified the theft of electricity and arrested the owner of the nightclub, as well as the two security personnel who had beaten up the respondent.

The respondent says that shortly after these arrests, he received a[n] anonymous phone calls with death threats indicating that he had made a big mistake in reporting to the police and shortly thereafter, a bomb was thrown at the front door of his parents' home. As a result of this incident, the respondent left his job, and his city, and moved approximately a hundred miles away to Rio de Janeiro to stay with friends. Because he was in fear of his life, he arranged to come to the United States and his parents advised him that there were people who were looking for him.

At the outset, I should [state] that I do not find the respondent to be a credible witness. I do not believe his story with respect to either the death threats received or the bombing incident at his parents' home. The respondent testified in a very hesitant way about these incidents and it was clear to me that someone who had been employed for a period of two years as an investigator would certainly spend more effort in working with the police in order to apprehend the alleged perpetrators. His statement that the police did not make any arrests because they could not find any evidence and that no one was present at the time does not make any sense to me. Something this critical and such a dangerous action to be taken against a worker, who was employed by the state, would certainly threaten the very existence of the ability of the state to work. It would seem to me that this would be a very high priority item for the police and the electric company, who would have gone

out of their way to apprehend the perpetrators or at least to investigate the case. The respondent's statement that the police told him to leave town or leave the country is not at all plausible. His statement that the electric company only cared about their lost money is also not plausible. Certainly, the electric company could not be seen as a company who would allow their employees' homes to be bombed and to do nothing about it.

Moreover, even if everything the respondent testified to is be believed there is insufficient evidence to show that he has a well-founded fear of persecution or that his life or freedom would be threatened. He has failed to support his claim by testimony which was plausible, detailed and coherent and the record contains merely the respondent's own unsubstantiated and conclusional statements in support of his persecution claim. The respondent worked for the government of Brazil. Clearly, he does not fear any harm from the government. The respondent's job was in the nature of a police officer, an arm of the state, and as such it is to [be] anticipated and the respondent [did] anticipated that threats would arise because of the nature of his job. Any possible retaliation taken against him would have had to be anticipated and would amount to no more than a personal grudge or a criminal action against the respondent. There would not have been any purpose for an alleged criminal, who was stealing electricity, to try to harm the respondent or others like him on account of one of the five statutory grounds.

As I have indicated above, it would seem to me that this sort of retaliation against a government worker would be at the highest priority to the government of Brazil and that no means would be overlooked in order to bring the perpetrators to justice. Clearly, allowing threats like this to go unresponded to would harm the electric company down the line in that the other investigators would become aware of what was happening and, if they knew that the electric company would not back them up, so-to-speak, then they would not pursue their jobs the way they should.

That is why I do not believe the circumstances as related by the respondent and, once again, even if I did the circumstances would not rise to the level as qualifying for political asylum or withholding of removal.

The respondent is ineligible to be granted voluntary departure in that he was not physically present in the United States for a period of at least one year immediately preceding the date the Notice to Appear was served under Section 239(a) of the Immigration and Nationality Act.

Accordingly then and for the reasons set forth above, the following orders will be entered:

ORDER

IT IS HEREBY ORDERED that the application for political asylum be denied.

IT IS FURTHER ORDERED that the application for withholding of removal be denied.

IT IS FURTHER ORDERED that the respondent be removed from the United States to Brazil on the basis of the charge contained in the Notice to Appear.

/s/ Leonard I. Shapiro
LEONARD I. SHAPIRO
U.S. Immigration Judge

United States Court of Appeals
For the First Circuit

No. 07-1091

KELMER DA SILVA NEVES

Petitioner

v.

MICHAEL B. MUKASEY, Attorney General

Respondent

Before

Lynch, *Chief Judge,* Torruella, Ebel,*
Boudin, Lipez and Howard, *Circuit Judges.*

ORDER OF COURT

Entered: **September 3, 2009**

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered

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* Of the Tenth Circuit, sitting by designation.

that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:
/s/ Richard Cushing Donovan, Clerk

cc:
John G. Amaya
Quynh Vu Bain
LaTia N. Bing
Kelmer Da Silva Neves
Saher Joseph Macarius
Stacey I. Young